International Law Studies—Volume 38

International Law Situations

With Solutions and Notes

U.S. Naval War College (Editor)

Situation I

BELLIGERENT AND NEUTRAL RIGHTS IN REGARD TO AIRCRAFT

States X and Y are at war. Other states are neutral. All states concerned are parties to the conventions relating to the conduct of aircraft as ratified by the Pan-American Conferences, and respect the generally accepted principles of international law.

(*a*) It is known that an aircraft, *B–17,* registered in state B, has carried to state X articles of the nature of contraband.

(*b*) It is known that an aircraft, *C–12,* registered in state C, has flown to a port O in state X above the line of vessels, submarines and aircraft, maintaining a blockade of port O.

(*c*) It is known that an aircraft, *D–20,* registered in state D, has carried in the regular air mail from port O to port N, an unblockaded port of state X, military messages, funds, and some light but essential military materials.

(*d*) It is known that an aircraft, *E–30,* registered in state E, has carried essential military materials to Forta, a town in state F near the frontier of state X, and that some of these materials were immediately shipped to state X.

(*e*) It is known that an aircraft, *G–40,* registered in state G, has under special charter carried General Xano of the Army of X from a port in state G to the military headquarters of state X.

These aircraft, severally, later, when above the high sea, are within an easy range of the guns of the *Y–2,* a military aircraft in state Y.

What may the *Y–2* lawfully do in each case?

SOLUTION

In each instance the *Y–2* may lawfully visit and search the neutral aircraft.

(*a*) The *B–17* should be released.

(*b*) If the *Y–2* is a member of the blockading squadron and if it meets the *C–12* while the latter is engaged on the return voyage, the *C–12* should be seized and held for prize court adjudication. If the *Y–2* encounters the *C–12* after the latter has completed the round trip journey, the *C–12* should be released. If the *Y–2* is not a member of the blockading squadron but meets the *C–12* while the latter is on the return trip, the *C–12* may be seized and held for prize court adjudication.

(*c*) The *D–20* should be released.

(*d*) The *E–30* should be released.

(*e*) If the *G–40* is no longer under special charter and if it has completed the journey for which it was hired, it should be released.

NOTES

Air law in general.—At the present time there are no binding conventional international law rules regulating the conduct of airplanes in war time. The need for effective law on this subject is great indeed, and it is to be hoped that the situation can be remedied in the near future. The use of airplanes in the Spanish Civil conflict and in the Sino-Japanese struggle has brought the law's gaps very vividly to public attention. Also the constant

menace and threat of air bombardment in a future war emphasizes the necessity for the development of international air law. Strictly speaking, therefore, since no binding rules exist, the *Y–2* might technically be permitted to do anything it pleased with the assorted neutral craft herein involved. The word "lawfully" will be construed, however, as implying the existence of legal principles, and the solutions will be reached in part by carrying over analogies from land and marine warfare into the air. As will be indicated later, the air weapon is *sui generis* in many respects, so that analogies are not always applicable, but they are none the less extremely useful in the formulation of the required rules.

Naval War College discussions.—The subject of air law has been considered previously in Naval War College situations, notably, in 1928, 1935, and 1936. As was stated in the 1936 situation:

> The introduction of aircraft as a means of warfare greatly modified the conduct of war upon the earth surface, on the water as well as on land. The earlier rules for warfare were concerned with surface combat. These rules could not in every instance be extended by analogy to aerial warfare, because the forms of warfare were not analogous. There was an attempt on the part of some writers to extend the three mile maritime jurisdiction doctrine to the superjacent air. In this attempt the early recognition of the fact that the law of gravity did not act horizontally and vertically in the same manner, destroyed the analogy. Differences in speed and in other respects introduced other complications in attempts to extend maritime and land rules to the air. Aircraft were coming more and more to be used in war; therefore, rules had to be devised. The World War experiences and problems contributed valuable basal data for the determination of the nature of possible regulation of use of aircraft. The equipment of aircraft with radio introduced other problems. (International Law Situations, 1936, p. 39.)

Can legal restraints on air warfare be made?—The feeling has been prevalent in some quarters that efforts to curb the use of aircraft in war are doomed to failure because this new weapon is so powerful that no belligerent would be willing to restrict the employment of this military arm. The devastation and destruction which airplanes may bring about, so the argument runs, will be so effective in bringing the opponent to terms that hereafter the sanctions for restraint will no longer be operative. Further, the possibilities of "totalitarian" wars between rival ideological groups makes it appear to some people that curbs would be of no value. This hypothesis that ruthlessness will "pay" and that legal restrictions will be footless, deserves examination.

The arguments in favor of putting restraints on the use of aircraft may be summed up as follows:

1. In the past, devastation has always been illegal when it has not been of military advantage. It has not profited a belligerent to destroy more life and property than he needs for the attainment of his military objective, namely, the subjection of the enemy. If a belligerent wins a verdict over a still prosperous foe, he is the richer and derives more benefit than if he had defeated a starved and exhausted enemy.

There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. (Manual, Rules of Land Warfare, 1914, Section 334.)

The object of war in the military sense is to procure the complete submission of the enemy at the earliest possible period with the least possible expenditure of men and money. (Wilson and Tucker, International Law, 9th Edition, p. 250.)

2. It is also always been held that it is to the advantage of all belligerents not to lapse into barbarism.

The advantage of having and of maintaining a regime under which the more gross and calamitous varieties of Schrecklichkeit are banned, will be apparent to the man on the street—who will be himself affected—and, one hopes, even to the most militarist governments. (J. M. Spaight, Airpower and War Rights, Second Edition, 1933, p. 29.)

3. There has usually been also a certain amount of natural chivalry and humanitarianism in warfare. These have underlain many of the war rules, the assumption being that there are certain things which human beings will not do to one another even in the heat of strife.

Airships frequently returned from their expeditions with their full complement of bombs, because they have not been able to make out certain targets with sufficient accuracy. It would have been easy enough for them before returning to get rid of their bombs and drop them on any place over which they happened to fly, if they wanted to kill harmless citizens. (Spaight, op. cit., p. 14.)

4. Another sanction for the laws of war has been the fear of retaliation. Restraint upon a belligerent has thus often been imposed by a dread of reprisals. Though these latter have never been successfully regulated by law, they have operated as a deterrent to lawless action.

5. In the case of air warfare it has often been contended that indiscriminate bombing only stiffens the resistance of the enemy population, and that ruthlessness, therefore, carries with it its own sanction. If this were so universally there would be no military advantage in wholesale air bombardment of crowded cities and innocent populations.

The sanctions for the laws of war have thus rested upon common sense and practical considerations. Rules and conventions which stray far from the realities of belligerent strife become fruitless moral injunctions, but ethics and military necessities frequently combine, as above shown, into imposing, sensible restraints upon a belligerent.

Air warfare and the sanctions of the laws of war.—As previously indicated, the belief is current among various groups that the customary sanctions do not and cannot operate where air combat is concerned. These arguments may be summarized as follows:

1. Contrary to the thesis that ruthless bombardment merely increases a nation's will to resist, is the view that devastation may in time weaken the morale of a belligerent state. The bombardments of Barcelona of March 1938, and the use of gas from the air by the Italians in Ethiopia are cited as examples of the way in which war from the sky can undermine the fighting spirit. The nerve-racking tension, the sleepless nights, the perpetual sense of insecurity, the nightmare of sudden death in one's own home or in those of friends and relatives, act as corrosives upon the iron will and tend to make a people wonder whether the ideals for which they think they are fighting are worth this holocaust and carnage.

It is not altogether true that the bombing of England had no moral effect for by moral effect is not meant only a sudden, craven desire to surrender; and secondly, that air attacks on the large centers of populations were merely side shows in 1915–18, whereas in the next war they will be a primary operation * * *. No doubt on the whole, London took the air raids with dignity and composure, but no

one who is acquainted with the facts can admit that the people who left London to crowd into Maidenhead, Manchester, Brighton, and other safer towns, were exclusively "Jews and Aliens." (Spaight, op. cit., pp. 8 and 9.)

2. On the grounds of military necessity it is denied by many that there is no military advantage in bombing food supplies, communication centers, crops and civilian homes. This is to say that the line between military requirements and useless civilian damage can no longer be drawn. Wide scale air operations dealing death indiscriminately, and paralyzing normal civilian operations, may have a definite military objective, in that the war may be shortened. This line of reasoning is allied to the discussion above about civilian morale because whatever tends to cause civilian resistance to crumble may be regarded as having a military objective. This of course is broadening the concept of military necessity in a fashion seldom previously tolerated. The effectiveness of the airplane, however, is so great and its potentialities for dealing deadly blows are so vast that it is said that air bombardments cannot be compared to the "unnecessary" damage committed by land and sea forces where the destruction is relatively so insignificant that it really does not "pay" and only causes useless loss unconnected with any genuine weakening of morale and resistance.

If * * * some but not an excessive loss of life can be shown to be involved in operations which will enormously abbreviate the periods of wars and will reduce to a comparatively trivial total the casualty lists and the huge but incalculable sum of indirect losses consequent upon hostilities, it could be argued that humanity will gain and not lose from the recognition of the legitimacy of the new method. (Spaight, op. cit., p. 81.)

3. As for chivalry, it is said that when ideologies clash the usual humanitarian feelings will be submerged. How, runs the query, can a Fascist and a Communist be expected to deal like gentlemen with one another when the only obligation which they feel is that of exterminating one another. As Spaight says "Condemnation or approval of any given bombardment will tend to vary with the ideological bias of the commentator upon it". (The 19th Century, Sept. 1938. Vol. 124, No. 739.)

4. When it comes to retaliation as a sanction, those opposing the attempt to regulate air warfare declare that if an air-minded belligerent is quick enough and ruthless enough, he can give the enemy such a blow at the outset that there will be no possibility for retaliation. Reprisals are a sanction only if the other side has the physical strength to threaten them. Therefore, a belligerent which has overwhelming supremacy in the air, and which can lay waste his opponent, need fear no retaliation and can hope for a speedy victory. These are the thoughts and dreams of those proposing the "War of Terror" which has the support of some strategists in some countries.

Despite the cogency of some of these arguments, it is still worth attempting to elaborate some rules. The unrestricted war of the skies has many devotees and their plea for a relaxation of the customary restraints has a certain plausibility, but it cannot be presumed without more experience and evidence that air warfare will be exempt from the sanctions which land and sea combatants have always encountered. To date, the existence of rules has been found to be of advantage. Upon that basis the effort to formulate a practical code

of the air should go forward, the drafters always bearing in mind the special nature of aircraft and the need for practical considerations. Even if a code between belligerents seems of dubious efficacy, there would be an obvious improvement in the relations between belligerents and neutrals if law on this topic were developed. A belligerent may well fear *neutral* retaliation, if not that of his opponent, and there would be a gain to all states through the making of effective regulations.

Actual and projected conventions and rules for the air.—The first rule concerning air warfare was drafted at the First Hague Peace Conference in 1899. That convention prohibited the discharge of projectiles from balloons for a period of 5 years. Before the convening of the second Hague conference in 1907, many states saw some of the possibilities of air warfare, and were therefore unwilling to renew their adherence to the 1899 convention. The only other pre-war regulation of air combat is found in Article 25 of Convention IV, Respecting the Laws and Customs of War on Land, which stipulated that "The attack or bombardment, *by whatever means,* of towns, villages, habitations, or buildings which are not defended, is prohibited." Much dispute has raged as to whether this article, being a part of a land convention, covers the air, though the words "whatever means" would seem to be rather comprehensive. The debate as to the intent of this regulation seems rather futile in any event, because only undefended places are immune, and it is never hard for belligerents to discover that a particular place which they wish to bombard is actually "defended."

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This same problem as to what is defended and what is not, arose in connection with Article I of Hague Convention IX concerning naval bombardment. During the world war, therefore, there was little effective legal regulation of air warfare which increased in magnitude and importance so tremendously at that time.

There was uncertainty before 1914 also as to jurisdiction over the air, some contending that the air above a certain height should be free, each subjacent state having an air belt comparable to marginal seas. The regulations of neutrals during the war and the experiences of that conflict gave impetus to the formulation of the present rule that each subjacent state has complete jurisdiction over all the air space above it. The absurdity of an air belt in the light of the laws of physics which decree that an object dropped from a great height will hit harder than an object dropped nearer the ground soon became manifest and post-war conventions and drafts have recognized each state's jurisdiction up to the heavens.

Post-war conventions and proposals.—A number of treaties have been made since the war which lay down rules for aircraft in peace time. The first of these was the Convention on the Regulation of Aerial Navigation of 1919 which states in Article I:

> The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

Another noteworthy convention was that made in Habana in 1928 on Commercial Aviation, and though its provisions are not designed for war, the following articles are relevant to this discussion:

ARTICLE 3. The following shall be deemed to be state air craft:

(*a*) Military and Naval aircraft.

(*b*) Aircraft exclusively employed in state service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All state aircraft other than military, naval, customs, and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present convention.

Following the Washington Limitation of Arms Conference of 1922 a commission of jurists met at The Hague and drafted a convention on air warfare. In this convention the criterion of defended or undefended was abandoned, and air bombardment was regulated in terms of objectives. The framers of these rules definitely prohibited indiscriminate bombardment, and endeavored to furnish a precise definition of the objectives which alone may be attacked. The following articles of this draft are the ones most relevant to this discussion:

ARTICLE 6. (1) The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

(2) A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The Prize Court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.

(3) Liability to capture of a neutral vessel or aircraft on account of the acts referred to in paragraphs (1) and (2) is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of.

ARTICLE 30. In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.

ARTICLE 37. Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

ARTICLE 49. Private aircraft are liable to visit and search and to capture by belligerent military aircraft.

ARTICLE 50. Belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible.

Refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon.

ARTICLE 53. A neutral private aircraft is liable to capture if it—

(*a*) Resists the legitimate exercise of belligerent rights.

(*b*) Violates a prohibition of which it has had notice issued by a belligerent commanding officer under article 30.

(*c*) Is engaged in unneutral service.

(*d*) Is armed in time of war when outside the jurisdiction of its own country.

(*e*) Has no external marks or uses false marks.

(*f*) Has no papers or insufficient or irregular papers.

(*g*) Is manifestly out of the line between the point of departure and the point of destination indicated in its papers and after such enquiries as the belligerent may deem necessary, no good cause is shown for the deviation. The aircraft, together with its crew and passengers, if any, may be detained by the belligerent, pending such enquiries.

(*h*) Carries, or itself constitutes, contraband of war.

(*i*) Is engaged in breach of a blockade duly established and effectively maintained.

(*k*) Has been transferred from belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft, as such, is exposed.

Provided, That in each case (except (*k*)) the ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i. e., since it left its point of departure and before it reached its point of destination.

ARTICLE 56. A private aircraft captured upon the ground that it has no external marks or is using false marks, or that it is armed in time of war outside the jurisdiction of its own country, is liable to condemnation.

A neutral private aircraft captured upon the ground that it has disregarded the direction of a belligerent commanding officer under article 30 is liable to condemnation, unless it can justify its presence within the prohibited zone.

In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel.

ARTICLE 58. Private aircraft which are found upon visit and search to be neutral aircraft liable to condemnation upon the ground of unneutral service, or upon the ground that they have no external marks or are bearing false marks, may be destroyed, if sending them in for adjudication would be

impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. Apart from the cases mentioned above, a neutral private aircraft must not be destroyed except in the gravest military emergency, which would not justify the officer in command in releasing it or sending it in for adjudication.

This last article is similar to Article 49 of the Declaration of London which is as follows:

As an exception a neutral vessel captured by a belligerent ship and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operation in which she is at the time engaged.

In all these proposals for dealing with aircraft the rules are either analogies or adaptations of analogies drawn from the generally accepted rules of naval and land warfare. Do these analogies hold? Should special rights be conferred upon airplanes? The answer frequently given is to the effect that special weaknesses or special ability do not bring special immunities or special privileges, and that new weapons must adapt themselves to the already accepted rules. Some modifications, however, are in order. Manifestly visit and search of an airplane by an airplane is quite different from a similar process on the surface. Deviation in certain circumstances must therefore be allowed, and in general, the fact that airplanes operate in a three dimensional realm, means that old regulations must take cognizance of the new physical problems.

Preliminary Harvard draft code.—Recently, research in international law under the auspices of the Harvard Law School has been made concerning rights and duties of neutral states in naval and aerial war. Though the research draft is not official, the following article, No. 111, gives an indica-

tion of the trend in adapting established principles to the needs of the new agency:

(1) A belligerent commissioned military aircraft may signal a merchant vessel to stop as by radio or by firing a machine gun burst across its bows.

(2) If sea conditions permit the aircraft to alight, the aircraft shall alight and the procedure applicable to surface vessels shall be followed.

(3) If the belligerent aircraft is unable to alight, it may require the vessel to proceed on its course under instructions as to speed until the sea moderates or until a naval vessel of the belligerent appears; if visit and search are not effected by either means within six hours, or if the aircraft does not remain within sight or hearing of the merchant vessel, the vessel may resume its course at normal speed.

(4) If the vessel when summoned does not stop, attempts to escape, resists visit and search, or does not proceed according to instructions, it may be compelled by force to stop and the belligerent shall not be responsible for resulting injury to life or property.

Assumptions in this case.—In arriving at the solutions of the problems presented, it has been assumed that the neutral plane in each case is either a private plane or is to be treated as such. (See Art. III of Habana Convention op. cit.) It is further assumed that the papers of these planes are in order, that the craft are plainly marked, that it has been possible to signal understandably for visit and search, that all parties have agreed upon the definition of contraband, that an effective blockade is being maintained, that the neutrals knew of the blockade, and that the planes were all unarmed. It is therefore possible now to leave the general considerations and to take up the specific issues raised in this situation.

Visit and search by airplanes.—It is agreed in principle that belligerent airplanes have the right

to visit and search not only neutral surface vessels but also neutral aircraft. Agreement upon the *application* of the principle in actual practice is difficult to achieve, divergent views having been propounded in various quarters at different times. At the meeting of the jurists at The Hague in 1923 the delegations were not in harmony on this point of the visit and search of surface craft. The Dutch representatives particularly were apprehensive lest the employment of aircraft involve the right of deviation. The jurists had to content themselves in Article 49 with the simple statement that "Private aircraft are liable to visit and search and to capture by belligerent military aircraft." The technique by which this was to be accomplished was not agreed upon. As the comment in the proposed draft says:

> No article on the subject of the exercise by belligerent military aircraft of the right of visit and search of merchant vessels has secured the votes of a majority of the Delegations, and therefore no article on the subject is included in the code of rules. Nevertheless, all the Delegations are impressed with the necessity of surrounding with proper safeguards the use of aircraft against merchant vessels. Otherwise excesses analogous to those which took place during the recent war might be reproduced in future wars.
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> The reason why no agreed text has been adopted by the Commission is due to divergence of view as to what action an aircraft should be permitted to take against a merchant vessel.
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> The aircraft in use today are light and fragile things. Except in favourable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (*visite sur place*). To make the right of visit and search by an aircraft effective it would usually be nec-

essary to direct the merchant vessels to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proofs derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy.

Is or is not a warship entitled to oblige a merchant vessel to deviate from her course for the purpose of enabling the right of visit and search to be carried out? Would an aircraft be exercising its rights in conformity with the rules to which surface warships are subject if it obliged a merchant vessel to deviate from her course in this way? Even if a warship is entitled on occasion to oblige a merchant vessel to deviate from her course before visiting her, can a similar right be recognised for military aircraft without opening the door to very great abuses?

These are the questions upon which the views entertained by the Delegations differed appreciably, and indicate the reasons why it was not found possible to devise any text on which all parties could agree.

With regard to visit and search of aircraft by aircraft, however, it was conceded by all parties, as recorded in Article 50, that the special nature of the craft made deviation imperative. Two airplanes simply cannot hover in mid-air while one of them attempts to inspect the other. The laws of gravity demand a change in the laws of nations. Thus it is permitted to a belligerent airplane to order the neutral craft to alight in or proceed to "a suitable locality reasonably accessible" for visit and search. The principle of the right of deviation is thus established.

Problems of signalling and of landing.—According to the general rule, the belligerent plane must signal the neutral plane and then ask it to alight. It is upon this question as to the method of signalling that international agreement is necessary. Should the belligerent plane be expected to maneuvre into a position from which it can fire a shot across the propeller (bow) of the neutral plane? Some authorities on air matters maintain that the pilot of a neutral plane would not be able to know when such a shot had been fired and that he would be informed of the order to land only if the shot actually hit his plane. In such a case, aircraft being more fragile and delicate than surface vessels, the damage committed might be out of all proportion to the military needs. For this reason it is frequently suggested that summons by shot is impractical and unjustifiable, and that communication or summons must be made in some other fashion, probably by radio.

A radio summons would be satisfactory if there were international agreement standardizing airplane radios and airplane signals. At the present time there is such uniformity among surface vessels' radio equipment which are tuned in frequently to a particular wave length for the reception of distress signals. In the air, however, no belligerent plane now could be certain that a neutral airplane was equipped to receive a radio summons. Misunderstanding and confusion can be eliminated only by the adoption of an international code on this matter. Assuming that this difficulty has been overcome, other problems arise. If the belligerent is certain that the neutral plane has under-

stood the summons and is deliberately not heeding it, is it justified in using force to bring the neutral plane to? On the surface such a right to the exercise of sufficient force to carry out a summons to halt exists, but this right may be exercised without necessarily destroying or damaging seriously the fleeing ship.

In the air, however, the frailty of the neutral plane may be such that any shot capable of bringing it to, might also destroy it. Some experts, therefore, would deny the belligerent the right to use force in this instance, contending that the safety of the passengers and personnel of the plane ought not to be put in jeopardy merely because of a refusal to land for purposes of visit. This, however, would constitute a serious restriction upon belligerent rights, a restraint which in practice indubitably would be unacceptable. Provided an accurate means for summoning can be agreed upon, it does not seem unreasonable to hold a neutral plane liable to the consequences of its own refusal to heed a legitimate summons even though those consequences be of the most serious sort. If the neutral plane in such circumstances is destroyed with complete loss of the lives and property on board, it was the fault of the neutral who took the risk, not the responsibility of the belligerent.

Other questions deserve attention. Suppose the neutral plane is encountered over the high seas and cannot alight upon the water? Suppose the weather is so bad that a sudden landing would be extremely perilous? Suppose the neutral plane does not have sufficient fuel to enable it to deviate and still reach its original destination? What is the meaning of

"unreasonably accessible"? The preliminary Harvard draft code, previously cited, attempts to answer these queries. Some such standard conventional arrangement is indeed an immediate need if there is to be any satisfactory regulation of air law. In all probability the belligerent will have to be accommodating in regard to supplying extra fuel if the need occurs, and will have to recognize weather conditions and the suitability of landing arrangements, with surface craft cooperating in the visit and search effort as suggested in the Harvard code. As to "reasonable accessibility" a radius of 50 miles seems a feasible limit for deviation at the present time. Future prize court interpretations of the word "reasonable" will help to evolve a satisfactory set of rulings on this as yet undetermined matter.

Attack on Chinese commercial airplane.—One of the first incidents involving an encounter between a military and a commercial plane was that which occurred in August 1938 near Macao in China. Although technically in this case there was no war and although visit of a neutral plane was not involved, the case sets an interesting precedent. Particularly to be noted is the Japanese contention that the commercial plane was not clearly marked. The fact that military and commercial aircraft ordinarily are not easily distinguishable is an important one for international law. If confusion is to be avoided, agreement must be reached upon the proper marking of nonmilitary planes. Otherwise "regrettable incidents" will continue to occur.

Text of a note presented to the Japanese Foreign Office by the American Ambassador at Tokyo, upon instruction of the Secretary of State:

AUGUST 26, 1938.

EXCELLENCY:

Acting under instructions, I have the honor on behalf of my Government to protest to Your Excellency against the unwarranted attack on August 24, 1938, near Macao, by Japanese airplanes upon a commercial airplane operated by the China National Aviation Corporation resulting in the total destruction of the commercial airplane, the loss of the lives of a number of noncombatant passengers, and the endangering of the life of the American pilot.

This attack upon the plane has aroused public feeling in the United States.

I am directed to point out to Your Excellency, with reference to the attack in question, that not only was the life of an American national directly imperilled but loss was also occasioned to American property interests as the Pan American Airways has a very substantial interest in the China National Aviation Corporation.

I am directed to invite the special attention of Your Excellency to the following points in the account of Pilot Wood: the China National Aviation Corporation plane was pursued by Japanese planes which started machine gunning; after the China National Aviation Corporation plane had successfully landed it was followed down by Japanese pursuit planes which continued to machine gun it until it had sunk; and when Pilot Wood started swimming across the river he was followed by one of the Japanese planes which continued to machine gun him.

My Government desires to express its emphatic objection to the jeopardizing in this way of the lives of American as well as other noncombatant occupants of unarmed civilian planes engaged in clearly recognized and established commercial services over a regularly scheduled air route.

I avail myself (etc.)

JOSEPH C. GREW.

(Press Releases, Vol. XIX, No. 465, pp. 146–147.)

Following is the text of the Japanese note, handed to United States Ambassador Joseph C. Grew tonight, replying to the American protest of August 26 against the destruction of a Chinese-American airliner near Canton August 24 (Tokyo, Aug. 31):

MONSIEUR L'AMBASSADEUR:

I have the honor to acknowledge Your Excellency's note of August 26 stating Your Excellency's protest under instructions and on behalf of the American Government against an unwarranted attack August 24 near Macao by Japanese airplanes upon a commercial airplane of the China National Aviation Corporation resulting in the total destruction of said Chinese plane and the loss of the lives of a number of its passengers and endangering the life of its American pilot.

The incident was caused by the C. N. A. C. plane which, within the Japanese field of operations, acted in such a manner as invited suspicions of its being a Chinese military craft, as stated in the following report, and which was consequently pursued and attacked by our naval planes in the belief that it was an enemy plane.

While it is to be regretted that this resulted in endangering the life of an American citizen who happened to be the pilot of the plane, as well as the death or wounding of noncombatant passengers and crew, the Japanese Government hold the view that the action of their naval planes was not unwarranted in the light of the above-mentioned circumstance.

It is also their opinion that the company to which the aircraft in question belonged being a Chinese juridical person, the incident is not one which involves Japan directly with any third power.

However, I desire to add that because of the wide discrepancies between the pilot's accounts, as given in Your Excellency's note, and reports in the hands of the Japanese Government, further investigations were instituted and the following new report has been received, which substantially confirms what Mr. Horinouchi (Vice Minister for Foreign

Affairs) on the occasion of Your Excellency's visit on the 26th stated on the basis of information then available.

I avail myself of this opportunity to renew to Your Excellency assurances of my highest consideration.

REPORT

On the morning of the 24th instant five Japanese naval airplanes, proceeding in the direction of the Canton-Hankow railway, unexpectedly sighted over Chiautao Island, at 9:30 a. m., a large-type land plane, bearing no distinguishing mark, some 2,000 meters away to the north, which was flying toward the west at an altitude of about 2,000 meters, and attempted to approach the plane for the purpose of identification.

The large plane in question, as soon as it discovered our naval planes approaching, abruptly turned in a northwesterly direction and took flight at full speed, hiding itself in the clouds. The approaching movement of the naval planes were made for the purpose of ascertaining the nature of the land plane.

However, seeing the plane flee from them, our air squadron concluded in the light of their past experiences that it was an enemy plane which came either to attack our warships or to make reconnaisance and accordingly took an offensive position by placing two planes above and three planes below the clouds. Soon after, our planes lying in wait below the clouds, discovering the supposedly enemy plane, pursued and attacked it.

The plane continued to flee by taking advantage of scattered clouds, but was hard pressed by our squadron and finally landed in the river on the south side of the delta which lies sixteen kilometers west of Hungmenchikow. From the time they first sighted the plane until the moment it landed our planes were situated directly behind it for most of the time, so that it was difficult to ascertain its character, and our planes were throughout in the belief that the land plane was an enemy craft.

As soon as the latter landed, however, our planes descended in order to inspect the spot. When they reached a point above the land plane where they could better distinguish the type of plane, a doubt arose as to its exact type.

Our planes therefore immediately stopped their attack. As stated above, there was some time, though very brief, after the landing of the said plane until doubt came to be entertained as to its nature, and during that brief period there were some among our craft which continued the attack, but there was absolutely no more shooting thereafter.

Our naval planes then dived to twenty meters above the water and inspected the landed plane, whereupon the plane in question was found to be an all-metal Douglas passenger plane with no painted mark except a Chinese character signifying "mail" marked on the upper face of its right wing and on the right side of its body. Our planes left without firing. Our planes saw on the landed plane the pilot and also a few passengers near the entrance of the passenger compartment in the rear, but they thought as the spot was close to the bank of the river these men would reach the shore (Press Releases, Vol. XIX, No. 466, pp. 156–158.)

Sending in to a prize court.—If, in the present case, visit and search of the neutral planes yields evidence of guilt, the craft should be sent in for prize court adjudication. It must be remembered that search is not an inquisition, that there must be legal grounds for holding the plane, that mere suspicion is not enough, and that visit and search are an enquiry, not a prosecution.

Whereas, according to the principles universally acknowledged, a belligerent ship of war has, as a general rule and except for special circumstances, the right to stop in the open sea a neutral commercial vessel and to proceed to visit and search it to assure himself whether it is observing the rules of neutrality, especially as to contraband;

Whereas, on the other hand, as the legality of every act going beyond the limits of visit and search depends upon the existence either of contraband trade or of sufficient reasons to believe that there is such,

as, in this respect, it is necessary to confine oneself *to reasons of a juridical nature;* * * *

as the information possessed by the Italian authorities was of too general a nature and had too little connection with

the aeroplane in question to constitute sufficient juridical reasons to believe in any hostile destination whatever and, consequently, to justify the capture of the vessel which was transporting the aeroplane. (The Carthage, G. G. Wilson, The Hague Arbitration Cases, p. 365.)

Airplanes and contraband.—The Jurists' Code envisages the seizure of neutral planes on the ground of carrying contraband (Art. 53, Sec. i). Undoubtedly in any future war belligerents will attempt to intercept contraband commerce by air as they have by sea, though special schemes for certification of neutral airships like one outlined in the preliminary Harvard Code may go into effect and so obviate the usual contraband rules. The problem of what constitutes contraband is not one that needs to be resolved here. Possibly every article will be contraband, or perhaps the concept will disappear entirely with neutrals and belligerents agreeing instead upon some sort of certificate system. In this instance, if the *B–17* were intercepted while actually carrying contraband, the plane would be liable to seizure. The air code is thus more severe than the surface law rules, for according to the jurists' plan, the vessel is liable merely for the carriage of contraband while surface merchant ships are not similarly liable unless some connection between the ownership of the vessel and that of the goods can be established. That is, if the ship's owners can be presumed to know that the ship is carrying contraband, the ship may then be seized. According to the Declaration of London presumption of such knowledge exists if—

(Article 40). * * * The contraband forms, either by value, by weight, by volume, or by freight, more than half the cargo.

The penalty for the carriage of contraband, however, terminates with the deposit of the goods. As the Jurist's Code states in Article 53:

> The ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i. e., since it left its point of departure and before it reached its point of destination.

The rule is the same for surface ships.

> A capture is not to be made on the ground of a carriage of contraband previously accomplished and at the time completed. (Declaration of London, Art. 38.)
>
> A vessel's liability to seizure for the carriage of contraband usually terminates with the deposit of the contraband cargo, unless the voyage has been accomplished by means of false or simulated papers. (Evans, Cases on International Law, pp. 700, 701 ff.)

Since the *B–17* is encountered "later," that is, presumably *after* it has completed the carriage of the contraband, it should be released by the *Y–2,* which should make a record of the visit and search in the *B–17's* log.

Should the air law be more rigorous?—The suggestion has been made that the application of the regular maritime rules by analogy to the air is unsatisfactory. The argument runs that since an airplane travels so much faster than a surface ship, and since it is capable of making so many more voyages, the penalty should be more severe. The greater effectiveness of the plane for the carriage of goods should make for an extension of the liability, according to this view. Also, it is said that because of the greater difficulty of intercepting aircraft, the penalty when they are caught should be correspondingly more stringent. The law in the future may move in this direction, but to date it

has not, and the solution must be reached on the basis of the established practice in maritime cases.

Airplanes and blockade.—There has not yet been in practice any attempt to maintain a blockade by airplanes but all discussions on the laws of warfare assume that such a blockade may some day be tried. The jurists in 1923 in Article 53 assumed such a contingency and gave a belligerent the right to seize on the grounds of violation of blockade. Students of the problem are in accord on the point that a blockade maintained by airplanes alone would be neither feasible nor possible. It is always in conjunction with surface vessel that an air blockade is considered. It is foreseen, however, that due to the three-dimensional activity of the airplane some change in the type of blockade may well come about, and that instead of a blockade being thought of in terms of a "line" it will be conceived of as more of a zone. Because of the ease with which planes might get around the conventional blockade, an increase in the belligerent's blockade radius may well be expected. In some recent discussions of the problem, it was agreed tentatively that a blockade might extend as a zone for 50 miles to sea from the enemy coastline.

Suggestions are not lacking that the concept of an air blockade is erroneous, and that it would be better to discard entirely blockade terminology from air law discussions, substituting instead the phrase "barred zone." Within such an area all travel by neutral or belligerent aircraft might be prohibited upon penalty of being fired upon. Visit and search as an institution would not be present in such a zone. Something analogous to the situation contemplated in Article 30 of the Jurists'

Code may prove more feasible for the air than the classic blockade.

In case the belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operation in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces, or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.

The subject of aircraft and blockade was thoroughly discussed in the Naval War College International Law Situation in 1935.

A blockade maintained by surface vessels only without means of preventing or rendering dangerous the passage of aircraft or submarines would be a "paper blockade" insofar as such craft were concerned even though proclaimed to include these. Any seaplane met at sea by a vessel of war may be visited and searched to determine its relation to the hostilities, and it may be treated according to the evidence found. In recent years, on account of improved means of communication, it would be difficult to prove ignorance.

Professor J. M. Spaight in his Air Power and War Rights, Second Edition, p. 394 et seq., explores the problems of air blockade very thoroughly, and suggests that "a different degree of effectiveness will probably be demanded in the air, because of the greater difficulty of controlling passage in that element."

Penalty for breach of blockade.—Assuming in this situation, however, that an effective blockade in the air is being maintained, it is important to decide just when the *C–12* was encountered by the *Y–2*. If the *C–12* is on the outward lap of the voyage to the blockaded port, it is liable for breach of blockade.

A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port, is liable to capture so long as she is pursued by a ship of the blockading force. (Declaration of London, Art. 20.)

If a vessel has succeeded in escaping from a blockaded port, liability to capture continues, according to American opinion, until the completion of the voyage; but with the termination of the voyage, the offense ends. (Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 31.)

Therefore, if the *Y–2* is a part of the blockading force, and meets the *C–12* while the latter is proceeding from the port of O, the *C–12* may be seized. However, if the latter has completed the round trip, liability has ceased and the *C–12* should be released. According to the traditional Anglo-American opinion as explained by C. C. Hyde, International Law, Vol. II, Page 682, the *C–12* is still liable on the return voyage when met by the *Y–2* even if the latter is not a member of the blockading squadron.

Further Comment on Blockade.—

No term in the whole range of maritime law has been the subject of greater abuse than that of blockade; and, as it was not contended that aircraft could in their present stage of development maintain a blockade in the same sense that surface ships can do, there was evident reason to apprehend that the anticipatory application to their activities of the term blockade would inject into the law an additional element of uncertainty and confusion capable of vast extension. Under the other provisions of the rule a considerable measure of power is conceded to belligerents in regard to the control of the movements of aircraft in the neighborhood of their military operations or military forces, this measure of control would evidently be helpful to a surface force maintaining a blockade, and to a land force maintaining a siege. Whether it is desirable to go further is a question for mature consideration. (John Bassett Moore, International Law & Some Current Illusions & Other Essays, 1924, p. 207.)

"Blockade" is here used in the same sense in which it is employed in Chapter 1 of the Declaration of London, that is to say, an operation of war for the purpose of preventing by the use of warships ingress or egress of commerce to or from a defined portion of the enemy's coast. It has no reference to a blockade enforced without the use of warships, nor does it cover military investments of particular localities on land. These operations, which may be termed "aerial blockade," were the subject of special examination by the experts attached to the various Delegations, who framed a special report on the subject for consideration by the Full Commission. The conditions contemplated in this sub-head are those of warships enforcing a blockade at sea with aircraft acting in co-operation with them. As the primary elements of the blockade will, therefore, be maritime, the recognised principles applicable to such blockade, as for instance, that it must be effective (Declaration of Paris, Art. 4), and that it must be duly notified and its precise limits fixed, will also apply. This is intended to be shown by the use of the words "breach of blockade duly established and effectively maintained" in the text of the sub-head.

It is too early yet to indicate with precision the extent to which the co-operation of aircraft in the maintenance of blockade at sea may be possible; experience alone can show. Nevertheless, it is necessary to indicate the sense in which the Commission has used the word "effective." As pointed out in the Declaration of London, the effectiveness of a blockade is a question of fact. The word "effective" is intended to ensure that it must be maintained by a force sufficient really to prevent access to the enemy coast-line. The prize court may, for instance, have to consider what proportion of surface vessels can escape the watchfulness of the blockading squadrons without endangering the effectiveness of the blockade; this is a question which the prize court alone can determine. In the same way, this question may have to be considered where aircraft are co-operating in the maintenance of a blockade.

The invention of the aircraft cannot impose upon a belligerent who desires to institute a blockade the obligation to employ aircraft in co-operation with his naval forces. If

he does not do so, the effectiveness of the blockade would not be affected by failure to stop aircraft passing through. It is only where the belligerent endeavours to render his blockade effective in the air-space above the sea as well as on the surface itself that captures of aircraft will be made and that any question of the effectiveness of the blockade in the air could arise.

The facility with which an aircraft, desirous of entering the blockaded area, could evade the blockade by passing outside the geographical limits of the blockade has not escaped the attention of the Commission. This practical question may affect the extent to which belligerents will resort to blockade in future, but it does not affect the fact that where a blockade has been established and an aircraft attempt to pass through into the blockaded area within the limits of the blockade, it should be liable to capture.

The Netherlands Delegation proposed to suppress (i) on the grounds that air blockade could not be effectively maintained, basing its opinion on its interpretation of the experts' report on the subject.

The British, French, Italian and Japanese Delegations voted for its maintenance. The American Delegation voted for its maintenance *ad referendum.* (Jurists' Report, 1923, Comment upon Art. 53, Sec. i.)

Visit and search and air mail.—An airplane carrying mail is not immune from visit and search. According to Hague Convention XI, Relating to the Exercise of the Right of Capture in Naval War "the inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general" (Art. 2). There is no legal reason, therefore, why the *Y–2* may not order the *D–20* to alight for visit and search. Though mail ships are not immune from belligerent visit and search, private correspondence on board is supposed to be inviolable (Hague Convention XI, Art. 1). The World War experience demonstrated,

however, that this inviolability is exceedingly uncertain, the result of the concessions made by the United States being in substance that private mail may be opened in order that the belligerent may determine whether it is inviolable or not. The Allied contention during the war was that the mail privileges were being abused by private persons who inserted contraband articles into their correspondence. The whole subject of mails was thoroughly reviewed and studied in Situation II, of the International Law Situations in 1928.

The situation when a seacraft endeavors to visit and search an aircraft is one involving exceptional dangers to the aircraft. Mere suspicion does not justify the subjection of aircraft to undue risk. Craft carrying mails should not be unnecessarily delayed. The mail carrier does not know what are the contents of the mail pouches and is not directly concerned with these contents. Guilt cannot be presumed. Destruction on ground of any act prior to the summons cannot easily be justified. (Naval War College Situations, 1928, pp. 70–71.)

The *D–20* even though it may be a state-owned craft, cannot be regarded by the *Y–2* as a military plane. In these days of increasing governmental ownership, with governments engaged in all kinds of new activities, the law still treats the vessels and planes owned by governments and performing non-military functions as private craft. e. g. The Habana Convention, 1928, Art. 3, op. cit.) The *D–20* may not be shot down as a military plane. In conducting visit and search the *Y–2* must follow the traditional rules applicable to merchant vessels. (Jurists' Report, Art. 56, Par. 3.)

Inasmuch as the military messages, funds, and military materials were carried in the regular airmail, the *D–20* was not guilty of unneutral service.

It was not engaged in a special voyage, nor was it under special charter to a belligerent state. As previously remarked, a craft carrying contraband even though caught *in delicto* is not liable unless its owners or operators could be presumed to know the nature of the cargo. The articles here were transported in the normal postal pouches, so that the *D–20* pilot or owner presumably had no knowledge of their contents. It is doubtful whether the articles here can be considered as contraband anyway because they were probably belligerent owned emanating as they did from a belligerent port. In any case, the *D–20* is guilty neither of unneutral service nor of carriage of contraband. The fact that mere carriage of the mails in regular pouches is not unneutral service is well explained in Spaight op. cit. page 392 and Oppenheim, International Law, 1935, Vol. II, page 699. Furthermore, the liability for carrying contraband and for unneutral service does not extend beyond the end of the voyage in which the craft was engaged in such an enterprise. The *D–20* probably having completed the voyage, is no longer subject to penalty. Possibly, if it were encountered while flying over the blockade line, or on a voyage on which it had broken the blockade, it could be seized as a blockade runner, but the facts in this case scarcely warrant such a conclusion.

Contraband and continuous voyage.—The issue raised in the case of the *E–30* is obviously one of "continuous voyage." This is really a part of the subject of contraband, for "continuous voyage" relates to the carriage of contraband articles by an indirect route. In contraband there are two elements, destination and the nature of the goods.

There must be an enemy destination and the goods must be neutral owned and of a nature useful for war. "Continuous voyage" involves the destination element in contraband, the belligerent in such matters claiming that the goods, though directed initially to neutral ports, are actually designed for trans-shipment or a continuation of the journey to belligerent hands. The doctrine first became important when neutrals attempted to circumvent the British Rule of 1756, according to which commerce between the mother country and the colonies, closed in peace time to third states, could not be opened to neutral ships in time of war. Triangular trade, such as that between the West Indies, an American port, and France, in which American (neutral) ships were engaged in carrying articles indirectly around two legs of a journey instead of directly between the West Indies and France, was intercepted and condemned by the British on the grounds that the trade really constituted one "continuous voyage." (The William, 1806, VI C. Robinson, 316.)

This doctrine was transferred to contraband and blockade during the American Civil War and was greatly extended during the last war when it really became a doctrine of ultimate destination and of substitution. The British prize courts condemned cargoes when there was no direct evidence that the goods were actually going to Germany and, instead, employed presumptions based upon statistics and obscure evidence. (The Kim, L. R., 1915, p. 215; the Baron Stjernblad, L. R. 1918, A. C. 173; The Bonna, L. R. 1918, p. 123.) In the last named of these, the doctrine of substitution made an appearance in the court's suggestion that even though the cocoanut oil on board did not actually go through

Sweden to Germany it might enable the Swedes to release a certain amount of margarine and butter from their "reservoir of fats" to Germany.

The subject of "continuous voyage" has been thoroughly treated in previous Naval War College Situations and material in this subject will be found in the volumes issued in 1922 and 1926. In the case of the *E–30* the contraband cargo has evidently been deposited, so that the aircraft is no longer liable, the rules and argumentation being the same as those discussed in Section (*a*) for the *B–17*.

Aircraft and unneutral service.—The international law rules in regard to unneutral service for merchant ships have been carried over into the law dealing with aircraft. This was recognized in Article 53, Section (*c*) of the Jurist's report which stated that "A neutral private aircraft is liable to capture if it * * * is engaged in unneutral service." Other drafts and plans for air law in wartime have also assumed that unneutral service would be a part of the air rules. Therefore, those acts which constitute unneutral service on the part of surface ships will also be unneutral service in the air. Maritime and air regulations will thus coincide, there being no reason why the different character of aircraft should create the necessity for genuinely new regulations or serious modifications in the old.

ART. 45. A neutral vessel is liable to be condemned and in a general way, is liable to the same treatment which a neutral vessel would undergo when liable to condemnation on account of contraband of war.

(1) If she is making a voyage specially with a view to the transport of individual passengers who are embodied in the

armed force of the enemy, or with a view to the transmission of information in the interest of the enemy.

(2) If, with the knowledge of the owner, of the one who charters the vessel entire, or of the master, she is transporting a military detachment of the enemy, or one or more persons who, during the voyage, lend direct assistance to the operations of the enemy. In the cases specified in the preceding paragraphs (1) and (2), goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if when the vessel is encountered at sea she is unaware of the opening of the hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark the passengers. The vessel is deemed to know of the state of war if she left an enemy port after the opening of hostilities, or a neutral port after there had been made in sufficient time a notification of the opening of hostilities to the Power to which such port belongs.

ART. 46. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant-vessel of the enemy:

(1) If she takes a direct part in the hostilities.

(2) If she is under the orders or under the control of an agent placed on board by the enemy Government.

(3) If she is chartered entirely by the enemy Government.

(4) If she is at the time and exclusively either devoted to the transport of enemy troops or to the transmission of information in the interest of the enemy.

In the cases specified in the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation.

ART. 47. Any individual embodied in the armed force of the enemy and who is found on board a neutral merchant-vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel. (Declaration of London, 1909.)

Unneutral service has been discussed previously in Naval War College Situations, the 1928 volume dealing carefully with this subject. In the résumé

that year, page 106, is found the following conclusion:

> While there has been a tendency to extend the scope of unneutral service, it is evident from practice, instructions, decisions, etc., that the principles of the Declaration of London of 1909 were generally accepted at the beginning of the World War in 1914. Where extreme action was taken during the World War on the ground of reprisals such action followed no precedent based on general practice.

The essence of unneutral service, or rather its chief ingredient, consists in the undertaking *specially* to perform some service for a belligerent. By engaging in such special undertakings, the neutral ship or plane divests itself of its normal commercial character and performs a military job. Unneutral service is thus distinguishable from contraband because in the latter the neutral ship is engaged in commercial enterprise, while in the former it is participating directly in a belligerent's affairs. Where an airplane like the *G–40* is carrying a belligerent general under a special charter it is clearly engaged in unneutral service for which the penalty is the seizure of the plane. If the general took passage on a regular commercial flight, and if the ship and its owners did not go out of their way to accommodate the general, there would be no liability. For a clear analysis of air law in regard to unneutral service see Spaight, op. cit., page 390 et. seq.

Period of liability for unneutral service by aircraft.—In the present case of the *G–40* if that plane has completed the round trip journey from the port in state G to the military headquarters of state X, its liability is at an end provided, as above indicated, the usual maritime law is made applica-

ble in toto to the air. In regard to penalty, however, there is some indication that for aircraft, liability is not discharged when the special service is terminated. In Article 6 of the Jurists' code it is stipulated that where a neutral vessel or aircraft transmits information to a belligerent concerning military operations, "liability to capture * * * is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of." Thus the air rules regarding penalty for unneutral service may become more stringent in the future. The fact that an airplane can deviate nowadays so easily and is relatively so mobile and swift that it can perform special services more frequently and expeditiously than can surface vessels indicates that for air law the period of liability will probably be longer than it has been for maritime law.

Résumé.—Although at the present time there are no binding rules of international law in regard to the conduct of hostilities in the air, and in regard to neutral and belligerent rights in the air, it is apparent that most of the conceptions and many of the rules of maritime law will be carried over into the rules for the air. The traditional rights of visit and search and of seizure on the grounds of contraband, blockade, and unneutral service will belong to belligerents in future conflicts. International agreement on the application of these rights is desperately needed. Because of the difficulties involved in carrying out visit and search, difficulties inherent in the nature of aircraft, future belligerents may be tempted to dis-

pense entirely with restraints and to shoot down neutral and enemy craft more or less indiscriminately. For the avoidance of such an unfortunate state of affairs, it is imperative that practical rules be devised.

The technique of visit and search in the air must be evolved with proper regard for the nature of aircraft. Unlike merchant vessels, aircraft must deviate in order to undergo visit and search, and agreement must be arrived at on such matters as proper landing places, weather conditions, and fuel supplies. It is essential, too, that nations make a convention on the method of signalling a neutral plane, it being probable that the traditional shot "across the bow" will not be feasible, and it being necessary further to establish uniformity in airplane radio sets, equipment for receiving, etc.

The air may bring modifications in the customary laws and rules relating to contraband and blockade. The high speeds of planes and the ease with which they can cross a line of blockade, may cause belligerents and neutrals to agree upon some sort of certificate scheme in the place of the conventional visit and search for contraband, and upon a "barred zone" in lieu of the old-time maritime blockade. Tentative agreements upon some of these matters, particularly those relating to the methods of signalling for visit and search, should be sought immediately, though the experience of future conflicts, if and when they come, will play a leading rôle in the development of the law.

As for the penalties involved in carriage of contraband, breach of blockade, and unneutral service, a tendency towards a greater severity is distinctly discernible. Facilities possessed by aircraft

for eluding capture and for making frequent trips, make it not unreasonable for the law to extend the period of liability beyond that customarily possessed by surface vessels. Planes may not, therefore, expect immunity when they have deposited contraband or terminated their act of unneutral service.

For the present, given the absence of formulated rules, the solution to air problems must be sought to a great extent upon the basis of analogy to maritime law, with distinct modifications, however, where these are called for by reason of the nature of aircraft. Although it has not been customary in international law to concede favors or privileges to new weapons because they possessed special handicaps or weaknesses, the laws of physics, that is, the fact that airplanes move in a three-dimensional realm and cannot stand still in the air, force modifications in the rules, not as a matter of special privilege, but as a matter of absolute necessity. This does not mean, therefore, that belligerent aircraft can claim freedom from legal restrictions merely because it is difficult to conform to formerly accepted principles. It does mean that the legal restraints must be adapted to the peculiar needs of the air. Nor may neutral craft claim special privileges merely because airplanes are relatively frail, and because the exercise of belligerent force might endanger the whole craft. An adjustment of risks and restraints can be made upon the basis of established principles with neutrals accepting interference with their air commerce and belligerents abandoning any pretentions to ruthlessness and arbitrary actions. The great belligerent-neutral compromises on visit and search,

contraband, blockade and unneutral service may be continued with necessary changes occasioned by the nature of the medium involved.

SOLUTION

In each instance the *Y–2* may lawfully visit and search the neutral aircraft.

(*a*) The *B–17* should be released.

(*b*) If the *Y–2* is a member of the blockading squadron and if it meets the *C–12* while the latter is engaged on the return voyage, the *C–12* should be seized and held for prize court adjudication. If the *Y–2* encounters the *C–12* after the latter has completed the round trip journey, the *C–12* should be released. If the *Y–2* is not a member of the blockading squadron but meets the *C–12* while the latter is on the return trip, the *C–12* may be seized and held for prize court adjudication.

(*c*) The *D–20* should be released.

(*d*) The *E–30* should be released.

(*e*) If the *G–40* is no longer under special charter, and if it has completed the journey for which it was hired, it should be released.

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